

EX PARTE OR LATE FILED

KECK, MAHIN & CATE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

8300 SEARS TOWER
SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606-6589
(312) 876-3400

TELECOPIER (312) 876-3582
TELEX 25-3411

1201 NEW YORK AVENUE, N.W.
PENTHOUSE
WASHINGTON, D.C. 20005-3919
(202) 789-3400

TELECOPIER (202) 789-1158

February 12, 1992

LOS ANGELES, CALIFORNIA
HOUSTON, TEXAS
PEORIA, ILLINOIS
SCHAUMBURG, ILLINOIS
OAKBROOK TERRACE, ILLINOIS

KECK MAHIN CATE & KOETHER
NEW YORK, NEW YORK
FAR HILLS, NEW JERSEY

FILE NUMBER

DIRECT DIAL (202) 789-3476

VIA HAND DELIVERY

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Written Ex Parte Presentation; RM-7872*

RECEIVED

FEB 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Searcy:

On behalf of The Wireless Cable Association, Inc. ("WCA") and pursuant to Section 1.1206(a)(1) of the Commission's Rules, we hand you herewith two copies of a written ex parte presentation delivered today in connection with the above-referenced proceeding.

Should you have any questions regarding this filing, please contact the undersigned.

Respectfully submitted,



Paul J. Sinderbrand

Counsel to The Wireless
Cable Association

Enclosures

No. of Copies rec'd 0+1
List A B C D (E)

KECK, MAHIN & CATE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

8300 SEARS TOWER
233 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606-6589
(312) 876-3400

TELECOPIER (312) 876-3582
TELEX 25-3411

1201 NEW YORK AVENUE, N.W.
PENTHOUSE
WASHINGTON, D.C. 20005-3919
(202) 789-3400

TELECOPIER (202) 789-1158

LOS ANGELES, CALIFORNIA
HOUSTON, TEXAS
PEORIA, ILLINOIS
SCHAUMBURG, ILLINOIS
OAKBROOK TERRACE, ILLINOIS

FILE NUMBER

DIRECT DIAL 789-3476

February 12, 1992

KECK MAHIN CATE & KOETHER
NEW YORK, NEW YORK
FAR HILLS, NEW JERSEY

The Hon. Alfred C. Sikes
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

RECEIVED

FEB 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Chairman Sikes:

On behalf of The Wireless Cable Association, Inc. ("WCA"), I am writing to alert you and your colleagues to troubling recent developments involving the Commission's processing of applications proposing to utilize the 28 GHz band -- fallow spectrum that, while the subject of three conflicting petitions for reallocation filed by Harris Corporation, Video/Phone Systems, Inc. and Suite 12 Group ("Suite 12"), is currently allocated exclusively for point-to-point common carrier usage.

The problem, simply stated, is that while the Commission is seeing a dramatic increase in applications for the 28 GHz band, none comport with the Commission's rules. Rather, these applications (most of which appear to be generated by Suite 12 and application mills) all propose non-common carrier, point-to-multipoint video distribution services such as advocated in the Suite 12 petition for rulemaking and request that the Commission grant the multitude of rule waivers necessary to permit such service under the current rules. Compounding the problem, the Domestic Facilities Division appears to be encouraging the filing of these premature applications by accepting them for filing and placing them on public notice. Almost two hundred 28 GHz band applications are already on file and the number is growing. Indeed, just last week the Domestic Facilities Division gave public notice that it has accepted close to forty new 28 GHz applications -- virtually every one of which has been prepared by the same engineering firm.

The cause of this phenomenon is not hard to find -- it is the Commission's ill-conceived 1991 decision to waive numerous Part 21 rules and grant Hye Crest

The Hon. Alfred C. Sikes
February 12, 1992
Page 2

Management, Inc. ("Hye Crest"), an affiliate of Suite 12, authority to utilize the 28 GHz band throughout the New York primary metropolitan statistical area for point-to-multipoint video distribution. See *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991). Given the speculative feeding frenzy that has accompanied every other Commission decision to make spectrum available for video distribution, the subsequent increase in 28 GHz applications since the decision in *Hye Crest Management, Inc.* comes as no surprise. Clearly, it was naive of the Commission to reject warnings from wireless interests (who advocated the conduct of a rulemaking before the issuance of licenses) and state that "we do not anticipate that our action today will result in an onslaught of waiver requests." *Id.* at 334. The Commission's error, however, is water over the dam -- the critical question is what will the Commission do now to close the floodgates.

At the outset, the Commission should recognize that, despite its opposition to the continued processing of 28 GHz applications, WCA is not necessarily opposed to the use of the 28 GHz band for a video transmission service. To the contrary, WCA views with excitement any technological development that has the potential for expanding the channel capacity available to wireless cable operators. In fact, it is this interest that is at the root of WCA's concern over the 28 GHz band filing frenzy -- wireless cable operators may soon find themselves with little choice but to also apply prematurely for 28 GHz authorizations in order to protect their potential access to this technology. Given the lack of definitive market definitions¹ or cut-off procedures² for the 28 GHz band, those

¹These applicants uniformly propose a single station with an operating radius of 3-5 miles, but urge the Commission to afford the applicant the exclusive right to the spectrum throughout a much larger geographic area. Proposed service areas have ranged from massive consolidated metropolitan statistical areas and areas of dominant influence to more modest primary metropolitan statistical areas and metropolitan statistical areas.

²Since the Commission's public notices announcing the acceptance for filing of 28 GHz band applications have not identified the market area a given applicant seeks to have reserved for it, it is unclear how the Domestic Facilities Division intends to cut-off subsequent applications. Certainly, if the Commission attempts to afford premature applicants cut-off protection based on the public notices that have been released so far, wireless cable operators can be expected to remind the Commission that it cannot lawfully
(continued...)

The Hon. Alfred C. Sikes
February 12, 1992
Page 3

who wait for the Commission to formally adopt 28 GHz rules may be doing so at their peril -- all filing opportunities may be foreclosed if the Commission continues to accept for filing and afford cut-off protection to premature applications.

Wireless cable operators are reluctant to join in this premature filing frenzy for several reasons, not the least of which is that there are too many unknowns at this time to permit the industry to even endorse the use of the 28 GHz band for video transmission.³ As WCA recently noted in its comments on a pending petition by Suite 12 for rulemaking proposing reallocation of the 28 GHz band for wireless cable:

"Put bluntly, WCA is troubled by the paucity of concrete evidence that Suite 12's proposed service is viable.

²(...continued)

cut off the filing of new applications without first fully apprising the public of what applications are to be precluded. *See, e.g., Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773-74 (D.C. Cir. 1961).

³Wireless operators are also concerned with the possible need for the Commission to adopt technology licensing requirements. Suite 12 has alleged that its patent "covers all low-power television systems that use (1) an array of omni-directional transmitters, and (2) a plurality of directional receiving units that receive a signal from only one of the omni-directional transmitter in the array." Petition of Suite 12 Group to Deny, File Nos. 10797-CF-P-91, at 13 n. 28 (filed June 14, 1991). Given Suite 12's extremely broad interpretation of its patent, and its heavy-handed threat to institute litigation against a company proposing to operate in the 28 GHz band utilizing an AM technology dissimilar to Suite 12's FM technology, wireless cable operators question whether they will be able to secure transmission equipment on equitable terms and conditions. While Suite 12 has responded to WCA by claiming that it has licensed its technology to over fifty 28 GHz band applicants, WCA notes that many of the 28 GHz band applicants are relatives of the principals of Suite 12 or are business associates. Unless the Commission adopts mandatory technology licensing requirements, there is a significant risk that Suite 12 will supplant the Commission in determining who can, and who cannot, offer service in the 28 GHz band.

The Hon. Alfred C. Sikes
February 12, 1992
Page 4

Because the propagation characteristics of the 28 GHz band mandate the use of relatively small cells, Suite 12 has proposed a service design that is dependent upon a level of frequency reuse presently unproven. . . .

The question, WCA submits, is whether the technology advanced by Suite 12 can achieve the claimed results. While Suite 12 has submitted to the Commission a theoretical analysis prepared by the David Sarnoff Research Center, it has failed to introduce into the record any test results establishing that its cellular system is viable.

Suite 12's failure to produce test results for the Commission's consideration is troubling. As Suite 12 candidly concedes, it has been the recipient of two Experimental Radio Service authorizations permitting it to test its cellular concept. While Suite 12 indicates in its petition that it has 'thoroughly tested' its system, Suite 12's curious failure to submit any test results is cause for concern."⁴

Unfortunately, Suite 12 has responded to WCA's concerns, not with proof that its system can perform as claimed, but rather with more rhetoric.⁵ At this juncture, it is simply impossible for WCA, or the Commission for that matter, to reach an informed judgement on the merits of Suite 12's proposal.

Regardless of whether or not Suite 12's technology can deliver what Suite 12 promises, there is no question that the current crop of 28 GHz band applications are grossly premature. Although these applicants attempt to side-step the issue throughout their filings, it is clear from the magnitude of the requested waivers that they are effectively asking the Commission to reallocate the 28 GHz band for a new usage, albeit on an *ad hoc* basis. WCA submits, however, that consideration of these proposals in the

⁴Comment of Wireless Cable Ass'n, RM-7872, at 3-4 (filed Jan. 15, 1992)

⁵Reply of Suite 12 Group, RM-7872, at 7 (filed Jan. 30, 1992).

The Hon. Alfred C. Sikes
February 12, 1992
Page 5

context of an application proceeding is highly inappropriate. It is well-settled as a matter of Commission policy that, absent extraordinary circumstances not present here, reallocation should be undertaken in rulemaking proceedings, rather than by the grant of waivers in application proceedings. See, e.g., *Lee Optical and Associated Companies Retirement and Pension Fund Trust*, 57 Rad. Reg. 1296, 1298 (P&F 1985) ("reallocation should be on the basis of a rulemaking and not an ad hoc waiver request"); *Fresno Mobile Radio, Inc.*, Mimeo 4417 (rel. May 13, 1986); *Amendment of Section 22.501(k) and Table A of Section 22.501 of the Commission's Rules to Allow Domestic Public Land Mobile Radio Service Mobile Unites to Operate on UHF Channel 14 Frequencies at Pittsburgh, PA*, 92 F.C.C.2d 457 (1982).

Under the present circumstances, consideration of the future of the 28 GHz band in the context of the pending petitions for rulemaking submitted by Suite 12, Harris Corporation and Video/Phone Systems, Inc. will not only comport with Commission precedent, it will provide the Commission with an appropriate forum for considering all of the implications of a reallocation of the 28 GHz band. Rather than provide a *de facto* reallocation of the 28 GHz band for sole the benefit of the few insiders who are today filing waiver requests, the Commission can better serve the public interest by first exploring all potential uses and regulatory approaches for the band in a rulemaking proceeding and, upon the completion of such a proceeding, providing all interested parties with a fair opportunity to compete for the right to provide service to the public. The current crop of applicants should not be permitted to implement their *ad hoc* proposals until the Commission has had an opportunity to adopt rules and policies that best serve the public interest in address the serious questions before it involving appropriate usage of the 28 GHz band, the appropriate number of licensees, eligibility requirements, application processing rules, technical requirements, technology licensing and the like. At such time, and only at such time, should the Commission begin accepting applications for whatever service the Commission ultimately decides should reside at 28 GHz. Such an approach will not only assure all interested parties a fair opportunity to compete, it will avoid the need for otherwise unnecessary compromises in the final rules designed to accommodate any facilities that are prematurely authorized.

For the foregoing reasons, WCA urges the Commission to impose an immediate filing freeze on the 28 GHz band and to dismiss all of the pending 28 GHz applications without prejudice to their resubmission should the Commission ultimately

The Hon. Alfred C. Sikes
February 12, 1992
Page 6

adopt rules providing for the usage of the 28 GHz band for point-to-multipoint video distribution. As the Commission found under identical circumstances, it would be fundamentally unfair to permit applications that propose uses for which the spectrum is not yet allocated to remain on file and secure cut-off protection. *See Various methods of transmitting program material to hotels and similar locations*, 54 Rad. Reg. 439, 449 (P&F 1983), *aff'd on recon.* 56 Rad. Reg. 305, 308-309 (P&F 1984).

Respectfully submitted,



Paul J. Sinderbrand

Counsel to The Wireless
Cable Association, Inc.

cc: Hon. James H. Quello
Hon. Sherrie P. Marshall
Hon. Andrew C. Barrett
Hon. Ervin S. Duggan
Richard M. Firestone
James R. Keegan
Robert James
Donna R. Searcy (for inclusion in ex parte file
associated with RM-7872)